IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-370

CITY OF PHILADELPHIA, *Respondent*

v.

JOSEPH F. KENNY, RAYMOND F. PERCIVAL, E. A. THOMAS, GUY W. HARVEY, JR., ABNER B. DECKERT, WILLIAM H. HAZZARD, JAMES SPROLES, JEROME L. NEWMAN, FREDERICK JENNINGS, GLORIA T. JONES, GEORGE V. SCHOCK, GEORGE J. CILONA, CHARLES H. CROSS, RONALD O. GAITHER, ARTHUR E. CORNELL, AND MEYER GOLDSTEIN,

AND

GORDON MACDONALD AND LAWRENCE ROCK, *Petitioners*

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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AND

GORDON MACDONALD AND LAWRENCE ROCK, *Petitioners*

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the Commonwealth Court of Pennsylvania. Petitioners are eighteen (18) individuals who are defendants in separate actions in the Court of Common Pleas of Philadelphia County and appellants in two separate consolidated appeals before the Commonwealth Court of Pennsylvania. The petitioners file a single Petition for Writ of Certiorari

covering all eighteen (18) cases since they involve an identical or closely related question pursuant to Supreme Court Rule 24(5).

OPINION BELOW

The opinion of the Commonwealth Court of Pennsylvania in sixteen of these cases is reported as *City of Philadelphia v. Kenny*, at 369 A.2d 1343 (February 8, 1977); the official report has not been printed as yet. A copy of the opinion in *City of Philadelphia v. Kenny* appears in the Appendix hereto as Appendix "A". The opinion of the Commonwealth Court of Pennsylvania in two of these cases is reported as *City of Philadelphia v. MacDonald*, at 369 A.2d 1341 (March 2, 1977); the official report has not been printed as yet. A copy of the opinion in *City of Philadelphia v. MacDonald* appears in the Appendix hereto as Appendix "B".

JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania in the sixteen cases consolidated as *City of Philadelphia v. Kenny* was entered on February 8, 1977. The judgment of the Commonwealth Court of Pennsylvania in the two cases consolidated as *City of Philadelphia v. MacDonald* was entered on March 2, 1977. Petitions for discretionary allowance of appeal to the Supreme Court of Pennsylvania were filed with the Prothonotary of the Supreme Court of Pennsylvania in a timely manner. The Supreme Court of Pennsylvania denied the Petitions for Allowance of Appeal from both opinions of the Commonwealth Court by separate orders dated June 27, 1977 and entered by the Prothonotary of the Supreme Court of Pennsylvania on June 28, 1977. The orders of the Supreme Court of Pennsylvania appear in the Appendix hereto as Appendix "C" and Appendix "D". This Petition for Writ

of Certiorari was filed within ninety (90) days of June 28, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Where the Government institutes a civil complaint alleging facts which are also the elements of a crime and the petitioner-defendant pleads as his answer his privilege to remain silent, did the lower court, by entering an automatic summary judgment against the petitioner-defendant, impose an unreasonable penalty upon petitioner-defendant's assertion of his Fifth Amendment rights?

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

This case concerns the application of the Fifth Amendmend of the United States Constitution which states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The eighteen (18) cases presented to this Honorable Court in this petition are in fact, substantially the same. In all eighteen (18) cases, the City of Philadelphia (hereinafter referred to as "City") instituted a separate civil action against each one of the individual petitioners. In verified pleadings, the City alleged that the individual petitioner involved in each case was legally obligated to pay the Philadelphia City Wage Tax, that he had failed to file a return for the City wage tax, and that he had failed to pay the tax. Such allegations, although necessary allegations of a civil action for collection of the tax, are also the necessary allegations of a criminal action for a fine or possible imprisonment under §19-508(3) of the Philadelphia Code. Such an action for a fine and possible imprisonment is a criminal proceeding under Pennsylvania Rules of Criminal Procedure 3(f), 3(k) and 67(a), as amended.

All of the petitioners in their separate, verified pleadings filed answers to the allegations of the City's complaints in which they admitted or specifically denied those allegations which could not tend to incriminate them, and asserted their Fifth Amendment right to remain silent as to those allegations of the City's complaint which could tend to incriminate them. The specific wording of this pleading was as follows:

> "Denied. Defendant specifically denies these allegations on the basis that he is entitled to deny them pursuant to the rights granted to him by the case of *City v. Cline*, 158 Pa. Super. 178 (1945), *cert. denied*, 328 U.S. 848, and the Fifth Amendment of the United States Constitution."

In each of these separate matters, the City of Philadelphia filed either a Motion for Judgment on the Pleading or a Motion for Summary Judgment under Pennsylvania Rules of Civil Procedure 1034 and 1035. The judges

of the Court of Common Pleas of Philadelphia County granted the City's motions and entered judgments in favor of the City against each of the individual petitioners. Each of the judges of the Court of Common Pleas of Philadelphia County who had these motions presented to them, filed opinions in which they ruled that the petitioners' assertion of their privilege to remain silent was an admission under the Rules of Civil Procedure, Pa. R.C.P. 1029, and therefore, the allegations without further evidence were uncontradicted and a judgment should be granted for the City.

Each of the individual petitioners appealed the judgments in their cases to the Commonwealth Court of Pennsylvania and sixteen (16) of these cases were consolidated for brief and argument under the title of *City of Philadelphia v. Joseph F. Kenny*, and two other cases were consolidated for separate brief and argument under the name of *City of Philadelphia v. Gordon MacDonald*. In the opinion of the Commonwealth Court in *City of Philadelphia v. Kenny*, the court ruled that the assertion of the privilege in these cases was proper. However, the court then reasoned as follows:

> "In the present cases, a reasonable inference to be drawn from the appellants' assertion of the privilege is that a truthful response to the relevant allegations of the City's complaint would fail to deny these allegations. [citations omitted.] Therefore, we may deem the allegations in paragraphs 2 and 5 of the complaint to be admitted by failure to deny specifically or by necessary implication,[3] and, therefore, the assertion of the privilege leaves *no* unresolved questions of fact which would render judgment on the pleadings or summary judgment inappropriate.
>
> 3. Pa. R.C.P. No. 1029(b), 42 Pa.C.S.A. [emphasis original]."

(Appendix "A," A9 and A10).

The Commonwealth Court thereafter affirmed the judgments of the courts below.

The Commonwealth Court also, in the cases of *City of Philadelphia v. MacDonald*, incorporated by reference the holding in its case of *City of Philadelphia v. Kenny*, as to this constitutional question.

All of the petitioners filed timely petitions for allowance for appeal with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the allowance of these discretionary appeals.

REASONS FOR GRANTING WRIT

1. The Decision Below Conflicts with the Generally Accepted Concepts of Due Process Concerning the Reasonable Sanctions Upon a Civil Defendant Invoking His Right to Remain Silent.

The prevailing rule of law in the United States is that prior to trial, the courts will not penalize a defendant for invoking the privilege against self-incrimination in a civil case.[1] This is based upon the concept that he is involuntarily before the court and the burden remains upon the plaintiff to prove its case. This proposition is well stated by the Supreme Court of New Jersey in a recent decision—*Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974)—which was cited by the Commonwealth Court in *City of Philadelphia v. Kenny* (A.9) as supporting its own decision. In *Mahne*, the Supreme Court stated:

> "The striking of the answers of the defendants, thereby placing them in a position of defaulting and non-resisting parties, appears to us to have imposed an undue cost on the exercise of the privilege and to have been unwarranted in the circumstances. The plaintiff has the burden of establishing his charge of adultery and there is no suggestion by him that he will be unable to proceed expeditiously with his case without the aid of pretrial testimony from the defendants. At the trial the plaintiff will have the benefit not only of his own showing but also of any inference to be drawn from the defendants' pretrial testimonial refusals." N.J. at 61-62, A.2d at 229.

The courts have generally refused to allow a plaintiff to win his civil case by forfeiture as a penalty to the de-

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1. *Mahne v. Mahne*, 66 N.J. 53, 59, 328 A.2d 228 (1974) and cases and articles cited therein.

fendant's good faith exercise of his constitutional rights. *Steinbrecher v. Wapnick*, 24 N.Y.2d 354, 248 N.E.2d 419 (1969). The courts have held that a summary judgment against a defendant is improper solely based upon his good faith exercise of his privilege, even though an adverse inference may be drawn against him at trial. *Grognet v. Fox Valley Trucking Service*, 45 Wis.2d 235, 172 N.Y.2d 819 (1969).

In attempting to avoid this well-established rule of due process and constitutional rights, the Commonwealth Court tried to declare it was merely making an "adverse inference." (A.9). The Commonwealth Court took this tact in an attempt to fit within the rule of many cases which have held that it is not an unreasonable sanction to draw an adverse inference against a civil defendant who asserts the privilege.[2] However, this rule is inapplicable to the present case since the rule was intended to be a lesser penalty to the defendant than the usual penalty to a plaintiff—that of entry of an automatic adverse judgment.[3] Not one case cited by the Commonwealth Court as its basis for "drawing an adverse inference" in the present case drew such an inference *prior to trial* on the merits.[4] By this alchemy, the Commonwealth Court tried to turn an unreasonable sanction into the mere allowance of an "adverse inference" from the assertion of the privilege.

Since the court below deprived petitioners of a trial on t e merits of the City's allegations of its complaints,

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2. 8 Wigmore, *Evidence* 429 (McNaughton Rev. 1961) n. 14.

3. Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 Brooklyn L. Rev. 121, 144-145 (1972).

4. *But cf.*, *Paynes v. Lee*, 362 F. Supp. 797 (M.D. La. 1973) (Inference not even drawn to determine preponderance of evidence).

the City was never forced to sustain its burden of proof or to present testimony before the trier of fact. Instead, the court below penalized petitioners for invoking their right to remain silent by declaring the assertion of the privilege to be a technical admission[5] of the City's allegations, thereby automatically entitling respondent-plaintiff to summary judgment against the petitioners.[6]

The present case presents a divergence from the generally accepted concepts of Due Process as related to the assertion of the Fifth Amendment.[7] The imposition of this unreasonable penalty upon petitioners' assertion of their constitutional rights justifies the granting of certiorari to review the judgment of the court below.

2. The Decision Below Is Not in Accord with the Prior Decisions of this Court Concerning the Government's Use of Penalties for the Non-Criminal Invocation of the Fifth Amendment.

This Honorable Court has established through a long series of cases that it is unreasonable for a governmental body to be able to impose automatic penalties against one who invokes his Fifth Amendment privilege in a "non-criminal" situation. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Lefkowitz v. Turley*, 414 U.S. 70 (1973). This Court has stated that such a penalty would make such an assertion

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5. Pa. R.C.P. 1029(b).

* * *

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivision (c) of this rule, shall have the effect of an admission.

* * *

6. Pa. R.C.P. 1034 & 1035.

7. Sewell, *The Self-Incrimination Clause And Administrative Law*, 39 Tennessee L. Rev. 207, 236-237 (1972).

of the privilege unreasonably costly. *Spevack v. Klein*, 385 U.S. 518 (1967).

The principal function of the privilege against self-incrimination

> ". . . is to protect all persons, whether suspected of crime or not, from abuse by the government of its powers of investigation, arrest, trial, and punishment. It was not solicitude for persons accused of crime but the desire to maintain the proper balance between the government and the persons governed that give rise to the adoption of these constitutional provisions."[8]

For the purpose of insuring a fair procedure in a criminal trial, the privilege must be liberally construed in favor of a defendant in a civil suit where the Government is the plaintiff, or else the Government will accomplish something that is not permissible at a criminal trial.[9] The Government should not be allowed to accomplish its investigation by forced self-incrimination through the bringing of a civil case.[10]

In the present case, petitioners may face criminal actions by the City and possible fine or incarceration for exactly the same alleged activities as set forth in the City's civil complaint. Such imprisonment and incarceration under Pennsylvania law is a criminal action. Pa. R. Crim. P. 67(a), as amended. By the nature of the Commonwealth Court's holding in the present cases, the petitioners face either the automatic entry of civil judgments in the amount of the alleged debts, or the requirement to waive their constitutional right. As this Honorable Court stated in *Garrity v. New Jersey, supra.*

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8. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 484 (1957).

9. *Id.* at 488.

10. *Id.* at 508-509.

> "Where the choice is 'between the rock and the whirlpool' duress is inherent in deciding to 'waive' one or the other." U.S. at 498.

The present case clearly fits within the *Garrity-Lefkowitz* decisions where the refusal to waive the Fifth Amendment privilege standing alone without regard to other evidence results in a costly sanction. This Court should allow a certiorari to stop this form of governmental abuse of the civil court system.

3. This Court Has Not Previously Determined the Question of Reasonable Sanctions Upon the Defendant in a Civil Litigation for Asserting His Fifth Amendment Privilege.

Although this Court has previously decided many cases concerning what penalties may and may not be imposed upon one who invokes the privilege under the Fifth Amendment, these cases present to this Court for its initial determination the question of what penalties may be imposed upon a defendant in a civil litigation who rightfully invokes his Fifth Amendment rights. This Honorable Court has recently broached this question in its decision in *Baxter v. Palmigiano*, 425 U.S. 308 (1976). However, *Baxter* reviewed the reasonableness of sanctions that were applied in a different setting—a prison disciplinary proceedings. Under this Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974), it was established that the due process requirements in such a correctional procedure were less stringent than in other situations. Justice Brennan in his dissent in *Baxter* stated that *Baxter* was the first time that the Court had ever approved of civil sanctions upon a defendant for invocation of the privilege in any type of non-criminal proceeding. 425 U.S. at 334.

This Honorable Court's decision in *Baxter, supra.*, approved the drawing of an adverse inference against an

inmate's silence at the disciplinary hearing itself where the Disciplinary Board had been provided other substantial evidence on the record as to the prisoner's wrongdoing. *Baxter* greatly differs from the present cases in that the court, prior to the trial on the merits, determined that the assertion of the privilege was an admission of the opponent's allegation; and thereafter, under the Rules of Procedure automatically entered a summary judgment against the petitioners. Thus, it is clear that this Court's decision in *Baxter* was not determinative of the substantial constitutional issue involved in the present cases.

Nevertheless, this Honorable Court in its decision in *Baxter* set the framework for review of this area of infringement upon the Fifth Amendment. This Court stated that the prison inmate

> ". . . is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. . . . It is thus undisputed that an *inmate's silence in and of itself* is insufficient to support an adverse decision by the Disciplinary Board." 425 U.S. at 317 [emphasis added].

Thus, this Court in the *Baxter* decision did establish a basis for reviewing the very situation that prevailed in the cases presented by this Petition.

The Writ of Ceriorari should be allowed to issue so that this Court can review for the first time the propriety of sanctions upon a civil defendant for assertion of his privilege against self-incrimination in light of this Honorable Court's recent tangential review of this issue in *Baxter v. Palmigiano, supra.*

4. The Decision Below Raises a Significant and Recurring Problem of the Propriety of Sanctioning a Civil Defendant for Asserting His Fifth Amendment Privilege.

The decision of the Commonwealth Court raises the entire spectrum of questions related to the imposition of sanctions upon a civil defendant for asserting his constitutional privilege under the Fifth Amendment. The question of the propriety and reasonableness of sanctioning the civil defendant is a recurring one in which there is a great deal of conflict amongst the various states, circuits and commentators.[11] Until this Court's recent decision in *Baxter v. Palmigiano, supra.*, there had not been any form of directions supplied by this Honorable Court to the judiciary in this pressing and important question.

Although it is your petitioners' contention that it is well-settled law amongst the states that a civil defendant should not be penalized prior to trial by the automatic entry of judgment in favor of the plaintiff when the defendant asserts his Fifth Amendment privilege,[12] there exists a substantial question as to what sanctions are indeed allowed. In some states, absolutely no comment or inference may be drawn from the civil defendant's assertion of the privilege.[13]

Prior to this present decision by the Commonwealth Court, Pennsylvania would have been considered such a

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11. *Kaneshiro v. Belisario*, 466 P.2d 452, 454 (Hawaii 1970).

12. *See*, Reason 1 of this Petition.

13. *Kaneshiro v. Belisario, supra.; State v. Dist. Ct. of Fourth Jud. Dist.*, 426 P.2d 431 (Wyo. 1967); *Arthurs v. Stern*, 425 F. Supp. 425 (D. Mass. March 3, 1977); *Berg v. Pentilla*, 173 Minn. 512, 217 N.W. 935 (1928); *State Board of Medical Examiners v. McHenery*, 69 So.2d 592 (La. Ct. App. 1953); *Frierson v. McIntyre*, 151 F. Supp. 5 (W.D. Va. 1953); and *Mayo v. Ford*, 184 A.2d 38 (D.C. Ct. Munic. App. 1962).

state. The Supreme Court of Pennsylvania in its decision in *In Re Silverberg*, 459 Pa. 107, 327 A.2d 106 (1974), held that it was a constitutionally impermissible inference to allow as a prior inconsistent statement the invocation of the right to remain silent at a pretrial hearing. The Supreme Court of Pennsylvania incorporated a passage from *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853), which was also quoted by this Honorable Court with favor in *Johnson v. United States*, 318 U.S. 189, 196-197 (1943), which stated as follows:

> "If the privilege claimed by the witness be allowed the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be effected injuriously by it." Pa. at 117, A.2d at 112.

Many commentators favor the position that no inference or comment be allowed against a defendant in a civil case who asserts the privilege. [14]

On the other side of this question there are a substantial number of states which adhere to the rule that at trial the plaintiff may make a comment to the jury and/or the finder of fact may draw an adverse inference about the civil defendant's invocation of the Fifth Amendment.[15] These are the cases listed by the Commonwealth Court in its opinion in the case of *City of Philadelphia v. Kenny*. There are also commentators who support this

14. Commentaries, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination*, 24 U. Fla. L. Rev. 541, 550 (1972); *Sewell, supra* at 245; and Comments, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U.Ill. L.F. 75, 78 (1968).

15. *See*, n.2, *supra*.

position on the basis that it is not the assertion of the privilege which is being penalized, but rather it is a logical inference from the failure to contradict other evidence on the record. [16]

It may be contended that this Honorable Court's decision in *Baxter v. Palmigiano, supra.*, would have settled this general question by alluding to the "prevailing rule" that an adverse inference may be drawn against the party at trial. 425 U.S. at 318. Nevertheless, federal district courts have already disregarded *Baxter*, distinguishing it from civil cases on the basis that it concerned prisoner's rights.[17] One commentator has stated that the holding in *Baxter* merely affects a "small class of people" and, furthermore, criticizes the Court for reducing the prisoner's privilege to a "hollow mockery".[18] Therefore, it can be seen that *Baxter* has not been read to have settled this area of law.

This continued conflict over the extent of reasonable sanctions upon asserting a constitutional privilege justifies the granting of a certiorari to review the judgment of the court below.

Respectfully submitted,

KENNETH E. AARON
Counsel for Petitioners

16. *Ratner, supra* at 477 and *Kaminsky, supra* at 149.

17. *Arthurs v. Stern, supra*, and *Cunningham v. Bronx Cty. Demo. Exec. Comm.*, 420 F. Supp. 1004 (S.D.N.Y. 1976) *prob. juris. noted sub nom., Lefkowitz v. Cunningham*, 97 S.Ct. 252 (1976) (No. 76-260).

18. Wayne, *Prison Disciplinary Proceedings and the Fifth Amendment Privilege Against Self-Incrimination*, 55 N.C.L. Rev. 254, 266 (1977).

Appendix A

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA
v. No. 409 C. D. 1975
JOSEPH F. KENNY,
Appellant

CITY OF PHILADELPHIA
v. No. 410 C. D. 1975
RAYMOND F. PERCIVAL,
Appellant

CITY OF PHILADELPHIA
v. No. 411 C. D. 1975
E. A. THOMAS,
Appellant

CITY OF PHILADELPHIA
v. No. 412 C. D. 1975
GUY W. HARVEY, JR.
Appellant

CITY OF PHILADELPHIA
v. No. 413 C. D. 1975
ABNER B. DECKERT,
Appellant

CITY OF PHILADELPHIA
v. No. 414 C. D. 1975
WILLIAM H. HAZZARD,
Appellant

CITY OF PHILADELPHIA
v. No. 653 C. D. 1975
JAMES SPROLES,
Appellant

CITY OF PHILADELPHIA
v. No. 734 C. D. 1975
JEROME L. NEWMAN, c/o
Defense Personnel Center
JEROME L. NEWMAN,
Appellant

CITY OF PHILADELPHIA
v. No. 735 C. D. 1975
FREDERIC JENNINGS,
Appellant

CITY OF PHILADELPHIA
v. No. 736 C. D. 1975
GLORIA T. JONES, c/o
Defense Personnel Center
GLORIA T. JONES,
Appellant

CITY OF PHILADELPHIA
v. No. 738 C. D. 1975
GEORGE V. SCHOCK, c/o
Defense Personnel Center
GEORGE V. SCHOCK,
Appellant

CITY OF PHILADELPHIA
v. No. 959 C. D. 1975
GEORGE J. CILONA,
Appellant

CITY OF PHILADELPHIA
v. No. 960 C. D. 1975
CHARLES H. CROSS,
Appellant

CITY OF PHILADELPHIA
v. No. 1006 C. D. 1975
RONALD O. GAITHER,
Appellant

CITY OF PHILADELPHIA
v. No. 1239 C. D. 1975
ARTHUR E. CORNELL,
Appellant

CITY OF PHILADELPHIA
v. No. 1240 C. D. 1975
MEYER GOLDSTEIN,
Appellant

BEFORE:

Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Harry A. Kramer, Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge

Argued: April 5, 1976

Opinion by Judge Kramer Filed: February 8, 1977

These cases involve appeals from the granting of summary judgments, or, as in several of the cases, judgments on the pleadings against the appellants. The appellants are residents of, or are domiciled in, the State of New Jersey, but are employed by the Federal Government at federal establishments inside the boundaries of the City of Philadelphia. These appeals are but the latest chapter in the history of litigation which has been unceasing since 1939, when the City first passed its Wage and Net Profits Tax Ordinance.[1]

In each of these cases, the City filed a complaint in assumpsit in the Court of Common Pleas of Philadelphia County. The complaints are all similar. Each alleged that the named defendant had not paid the wage tax for the various years shown on the complaints. Each demanded

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1. Philadelphia, Pa., Code, §19-1500 et seq. (1973).

payment of the delinquent taxes plus interest and penalties, pursuant to Section 19-508(1) of The Philadelphia Code, which provides in pertinent part:

> (1) If any tax imposed under this Title is not paid when due, interest at the rate of ½% of the amount of the unpaid tax and a penalty at the rate of 1% of the amount of the unpaid tax shall be added for each month or fraction thereof during which the tax shall remain unpaid and shall be collected, together with the amount of the tax.

Each defendant filed an answer in which he or she denied certain allegations of the complaint, and, as to the remaining allegations, asserted the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. Each answer also contained new matter which alleged that the action was barred by the statute of limitations and that the City's wage tax law was unconstitutional under the Pennsylvania and the United States Constitutions.

After all pleadings procedure had closed, the City moved for judgment on the pleadings in its actions against Defendants Thomas, Percival, Kenny, Hazzard, Harvey, and Deckert. Judge Paul A. Dandridge entered orders granting the City's motion. In the actions against Defendants Sproles, Newman, Jennings, Jones, Schock, Goldstein, Cornell, Cilona, and Cross, the City submitted supporting affidavits and moved for summary judgment. The motions in these cases were assigned to six separate judges, who heard and granted the motions. We will affirm the orders of the court below in all 15 of these appeals.

The primary issues raised by the appellants can be summarized as follows: (1) Do the appellants' assertions, in their answers, of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution leave unresolved questions of fact which render judgment on the pleadings or summary judgment inappropriate? (2) Have the appellants adequately denied certain averments of fact in the City's complaint, so as to leave unresolved questions of fact which render judgment on the pleadings or summary judgment inappropriate? (3) Does the doctrine of estoppel for failure to exhaust administrative remedies preclude the appellants from raising, as new matter, the defenses of unconstitutionality of the wage tax ordinance and the running of the statute of limitations? and (4) If the appellants are not precluded from raising the aforementioned defenses, are there any unresolved questions of fact which must be answered before we may rule on the merits of these defenses?

As can be seen, the general thrust of these issues is a challenge to the appropriateness of judgments on the pleadings or summary judgments, as the case may be, for the disposition of these cases. As an appropriate starting point, we note our conclusion that each of the City's complaints contains adequate allegations to support a lawsuit in assumpsit, and, therefore, we are concerned with the legal sufficiency of the appellants' answers thereto. Since the pleadings in all of these cases are similar in all respects material to the application of the relevant legal principles, quoted portions of the pleadings will be drawn from the action against Guy W. Harvey for illustrative purposes.

I. DO THE APPELLANTS' ASSERTIONS OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION LEAVE UNRESOLVED QUESTIONS OF FACT?

In paragraph 2 of each of the complaints, the City alleged the defendant's name, the name of his or her employer, his or her place of employment, and his or her social security number and account number with the Department of Collections. In paragraph 5 of each complaint, the City alleged the defendant's income for the years in

question. Each appellant's answer responded to these averments by an assertion of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

It is indisputable that the Fifth Amendment privilege against self-incrimination is applicable to the States via the Fourteenth Amendment, and that it applies to protect an individual not only from being compelled to testify against himself in a criminal prosecution, but also privileges him not to answer official questions in any proceeding, criminal or civil, where the answer might incriminate him in future criminal proceedings. *Leftkowitz v. Turley*, 414 U.S. 70, 77 (1973).

In Pennsylvania, pleadings are conclusive in the actions in which they are filed. *Ham v. Gouge*. 214 Pa. Superior Ct. 423, 257 A.2d 650 (1969). Moreover, in the absence of statutory prohibitions, a party's *voluntary* testimony or statements made in pleadings or other papers filed in a judicial proceeding, may be used against him in a subsequent criminal prosecution. 1 Henry, Pennsylvania Evidence, §82 (4th ed. 1956); *see also Commonwealth v. Ensign*, 228 Pa. 400, 403-4, 77 A. 657, 658 (1910), *aff'd*, 227 U.S. 592 (1912); *Commonwealth v. Cavanaugh*, 159 Pa. Superior Ct. 113, 119, 46 A.2d 579, 582 (1946); *Charles v. Arrington*, 110 Pa. Superior Ct. 173, 177, 167 A. 428, 429 (1933). It follows that a defendant in a civil case must be entitled to assert the privilege in his pleadings, when allegations in the complaint call for answers which may tend to incriminate him. *See de Antonio v. Solomon*, 41 F.R.D. 447 (D.C. Mass. 1966); *Ensign, supra; Cavanaugh, supra*. It must be emphasized, however, that the interdiction of the privilege operates only in situations presenting the possibility of *criminal liability*. *Hale v. Henkle*, 201 U.S. 43, 67 (1906); *Riccobene Appeal*, 439 Pa. 404, 268 A.2d 104 (1970).

It is clearly the law of Pennsylvania that the prosecution for violation of a municipal ordinance is procedurally

a civil case. *e.g., Waynesburg Borough v. van Scyoc*, 419 Pa. 104, 213 A.2d 216 (1965); *Commonwealth v. Ashenfelder*, 413 Pa. 517, 198 A.2d 514 (1964); *Philadelphia v. Home Agency, Inc.*, 4 Pa. Commonwealth Ct. 174, 285 A.2d 196 (1971). In *Philadelphia v. Konopacki*, Pa. Commonwealth Ct. , 366 A.2d 608 (1976), this Court squarely held that an action for fines for violations of the wage tax provisions of The Philadelphia Code, §19-500 et seq. (1973), is a civil action. This is not dispositive, however, for each appellant has cited the case of *Philadelphia v. Cline*, 158 Pa. Superior Ct. 179, 44 A.2d 610 (1945), *cert. denied*, 328 U.S. 848 (1946), which held that the defendants in an action in assumpsit for *fines* for failure to file returns under the Philadelphia Wage Tax Ordinance could assert the privilege and refuse to testify, and that no comment could be made upon their silence, nor could any adverse inference be drawn from it. *Cline, supra*, at 184-86, 44 A.2d at 613. We are of the opinion that *Cline* was correctly decided, but we conclude that the judgments granted below in the present cases do not violate the holding in that case.

The holding in *Cline* rests upon the proposition that actions for penalties, even though prosecuted through modes of procedure applicable to the ordinary civil remedy, may be "criminal" in their nature for Fifth Amendment purposes, e.g., *United States v. United States Coin and Currency*, 410 U.S. 715 (1971); *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886); *Osborne v. First Nat'l Bank*, 154 Pa. 134, 26 A. 289 (1893); *Boyle v. Smithman*, 146 Pa. 255, 23 A. 397 (1892). As the cited cases point out, in such "quasi-criminal" cases, the Fifth Amendment privilege is fully applicable; the defendant may refuse to testify altogether and no adverse inference may be drawn from such refusal. We agree with the court in *Cline, supra*, that an action for *fines* and *imprisonment*, if said fine is not paid within ten days,[2] is such a "quasi-criminal" case.

2. Philadelphia, Pa., Code §19-508(3) (1973).

However, not all penalties pursued by civil actions are "quasi-criminal". A penalty may be primarily remedial, as opposed to criminal, in character, and, if this is the case, such guarantees of the Fifth Amendment as the prohibition of double jeopardy and the privilege against self-incrimination do not apply. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972); *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-52 (1943); *Helvering v. Mitchell*, 303 U.S. 391, 398-405, 404 n. 12 (1938). The penalty sought in the present cases under Section 19-508(1) is an addition to the appellants' taxes of one percentum per month for each month the tax remains unpaid. Such a sanction is primarily remedial in character. It is provided as a safeguard for the protection of the revenue and to reimburse the City government for the heavy expense of investigations, litigation, and other measures designed to accomplish assessment and collection of taxes necessitated by the taxpayer's failure or refusal to pay that tax. *See Helvering v. Mitchell, supra* at 401. The penalty provided in Section 19-508(1) falls, in our opinion, entirely within the reasoning of the Court in *Mitchell*. It should be noted that the Court in that case, while in the process of concluding that a 50 percentum addition to taxes owed for fraudulent evasion was a purely civil sanction, noted that an addition to the tax of one percentum per month in the case of non-payment was *obviously* intended by a Congress as a civil incident of the assessment and collection of the income tax. *Helvering v. Mitchell, supra*, at 405. We believe it likewise clear that the "penalty" in Section 19-508(1) of this Ordinance was intended by its promulgators as a civil incident of the assessment and collection of the wage tax, and we so hold.

Since we have held the present cases to be completely civil in nature, they *alone* provide no grounds to support the assertion of the privilege by the appellants. However, as pointed out in the briefs, the appellants may well be

subjected to future proceedings by the City for fines and imprisonment in default of payment of said fines under Section 19-508(3) for failure to file returns covering the tax liability at issue here. Because of their reasonable apprehension of such "quasi-criminal" proceedings, the appellants were entitled to assert the privilege in these civil cases. *Leftkowitz v. Turley*, 414 U.S. 70, 77 (1973). This does *not* mean, however, that the effect of the privilege is the same as if it had been invoked in a criminal or quasi-criminal case. Although we have discovered no Pennsylvania cases so holding, there is much authority for the proposition that, while a defendant in a civil case may invoke the privilege and it may not be used against him in any way in a *subsequent criminal prosecution*, the court in the *civil case* may draw any adverse inference which is reasonable from the assertion of the privilege. *Kent v. United States*, 157 F.2d 1 (5th Cir.) *cert. denied*, 329 U.S. 785 (1946); *Paynes v. Lee*, 362 F. Supp. 797 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974); *Stillman Pond, Inc. v. Watson*, 115 Cal. 2d 440, 252 [*Sic*] 2d 717 (Ct. App. 1953); *Simpson v. Simpson*, 233 Ga. 17, 209 S.E. 2d 611 (1974); *Allen v. Lindeman*, 259 Iowa 1384, 148 N.W. 2d 610 (1967); *Ralph Hegman Co. v. Transamerica Insurance Co.*, 293 Minn. 323, 198 N.W. 2d 555 (1972); *Morgan v. U. S. Fidelity and Guaranty Co.*, 222 S. 2d 820 (Miss.), *cert. denied*, 396 U.S. 842 (1969); *Harwell v. Harwell*, 355 S.W. 2d 137 (Mo. App. 1962); *Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974); *In Re Tesch*, 322 N.Y.S. 2d 538, 66 Misc. 2d 900 (1971); *Ikeda v. Curtis*, 43 Wash. 2d 449, 261 P. 2d 684 (1953); *Molloy v. Molloy*. 46 Wisc. 2d 682, 176 N.W. 2d 292 (1970); 8 Wigmore, Evidence, §2272(1)(e) (McNaughton rev. 1961); 8 C.J.S. Witnesses, §455. We conclude that the rule enunciated in the cited authorities is sound, and we adopt it. In the present cases, a reasonable inference to be drawn from the appellants' assertion of the privilege is that a truthful response to the relevant allegations of the City's complaint would fail to

deny these allegations. *See, e.g., Simpson v. Simpson, supra,* at 21, 209 S.E. 2d at 614; *Molloy v. Molloy, supra,* at 687 [Sic]. Therefore, we may deem the allegations in paragraphs 2 and 5 of the complaint to be admitted by failure to deny specifically or by necessary implication,[3] and, therefore, the assertion of the privilege leaves *no* unresolved questions of fact which would render judgment on the pleadings or summary judgment inappropriate.

* * *

3. Pa. R.C.P. No. 1029(b), 43 Pa. C.S.A.

CONCLUSION

Based upon the reasoning and conclusions in Parts I, II and III of this Opinion, it is the conclusion of this Court that the pleadings in these 15 cases leave no questions of unknown or unresolved material fact and that trial on the merits would be a fruitless exercise. The granting of motions for judgment on the pleadings, in those cases where such motions were made, was proper. As for those cases involving the granting of summary judgment, we find nothing in the City's affidavits which would detract from or conflict with the pleadings in those cases. Therefore, we hold the granting of summary judgment in those cases to be likewise proper. We affirm the judgments of the court below.

/s/ _____

Harry A. Kramer, Judge

Appendix B

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA

v.

GORDON MACDONALD,
Appellant No. 1593 Commonwealth Docket 1975

CITY OF PHILADELPHIA

v.

LAWRENCE ROCK,
Appellant No. 157 Commonwealth Docket 1976

BEFORE: Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Roy Wilkinson, Jr., Judge

ARGUED: October 8, 1976

OPINION

Opinion by Judge Wilkinson Filed March 2, 1977

Defendants appeal from the granting of the City of Philadelphia's (plaintiff's) motions for judgment on the pleadings in civil actions to collect the Philadelphia Wage Tax. PHILADELPHIA, PA., CODE §19-1500 et seq. (1973). Because the issues on appeal are identical the cases have been consolidated. We affirm.

Plaintiff's complaints allege that each defendant was employed in Philadelphia, failed to file a wage tax return

for the years 1970-1973, and owed the City unpaid taxes.[1] Each complaint further alleges that on information received from the defendant's employer an assessment was made and that the defendant was notified of the assessment and failed to appeal to the Philadelphia Tax Review Board. In their answers, each defendant denies knowledge of how the assessment was made and attempts to deny all other allegations by invoking the Fifth Amendment privilege against self-incrimination. In new matter the defendants contend that that Philadelphia Wage Tax is unconstitutional as applied to themselves and that the City's claim is barred by the statute of limitations. Plaintiff filed motions for judgment on the pleadings which were granted by the court below.

On appeal, the defendants raise the following issues: (1) Whether in a civil action the defendants' answers invoking the Fifth Amendment right to remain silent may be deemed admissions under Pa. R.C.P. No. 1029; (2) if so, whether defendants should be allowed to amend their complaints; (3) whether certain allegations in plaintiff's complaints are actually conclusions of law to which no answer is necessary; (4) if not, whether the doctrine of estoppel for failure to exhaust administrative remedies precludes defendants from raising defenses based on the statute of limitations and on the constitutionality of the Philadelphia Wage Tax; (5) if not estopped, whether the Philadelphia Wage Tax is constitutionally applied to the defendants, and whether the actions are barred by the statute of limitations.

This case is similar to our recent decision in *City of Philadelphia v. Kenny et al.*, Pa. Commonwealth Ct. , A.2d (No. 409 C.D. 1975, filed February 8, 1977), and is controlled by it. Judge Kramer's opinion specifically

1. Defendant MacDonald worked at the Philadelphia International Airport; his back taxes amount to $2,771.00. Defendant Rock worked at the Philadelphia Naval Shipyard; his back taxes amount to $1,084.63.

rejected issues 1, 4 and 5 so we need not comment on them here. The only issues remaining for our decision concern paragraph 6 of plaintiff's complaints and whether defendants should be granted leave to amend their answers.

Paragraph 6 of each complaint reads:

> "Based on information supplied by the Federal Agency to the Department of Collections of the City of Philadelphia, assessments were made and the Defendant was duly notified of such assessments from which the Defendant failed to file a petition for Review with the Philadelphia Tax Review Board as permitted under Section 19-1702 of The Philadelphia Code."

Each defendant denied knowledge of *how* the assessment was made, not *whether* an assessment was made. Each defendant then exercised his right against self-incrimination, refusing to answer further.

The defendants contend that only the allegation that an assessment was made is an allegation of fact and that the balance of the paragraph contains conclusions of law to which refusing to answer cannot be deemed an admission. We disagree. To establish that defendants failed to exhaust administrative remedies the City had to allege and, if denied, prove as *facts* that an assessment was made, that the defendants were given notice and that they failed to appeal the assessment. As a fact, either notice was given to the defendants or it was not; either the assessment was appealed or it was not. By their failure to properly deny these factual allegations the defendants have admitted their failure to exhaust administrative remedies.

Finally, defendants contend that if the invocation of the Fifth Amendment is deemed an admission that they should be granted leave of court to amend their answers to conform with Pa. R.C.P. No. 1029. Defendants never petitioned the court below to allow the amendment of their

answers even though it is within the discretion of the *trial* court to grant a party leave of court to amend an answer during the pendency of a motion for judgment on the pleadings, *Pots Manufacturing Co. v. Loffredo*, 235 Pa. Superior Ct. 294, 340 A.2d 468 (1975), and even after judgment, when an award has been made and an appeal taken therefrom. *Sheppard v. First Pennsylvania Banking & Trust Co.*, 199 Pa. Superior Ct. 190, 184 A.2d 309 (1962). Because the issue was not raised below we cannot consider it on appeal. Pa. R.A.P. 302.

Accordingly, we will enter the following

ORDER

Now, March 2, 1977, the orders of the Court of Common Pleas of Philadelphia County, dated October 6, 1975, and December 29, 1975, are hereby affirmed.

/s/ _____
Roy Wilkinson, Jr., Judge

Appendix C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
PROTHONOTARY

Laura E. Litchard
DEPUTY PROTHONOTARY

Philadelphia, 19107
June 28, 1977

Kenneth E. Aaron, Esq.,
Casper, Davidson, Rutstein & Aaron
Suite 935 Lafayette Bldg.,
Phila., Pa. 19106

In re: City of Philadelphia v. Joseph F. Kenny, et al., Petitioners.
No. 2958 Allocatur Docket

Dear Mr. Aaron:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"June 27, 1977
Denied
Per Curiam"

Very truly yours,
/s/ _____
Sally Mrvos
Prothonotary

SMM:mb
CC: Stewart M. Weintraub, Esq.

Appendix D

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
PROTHONOTARY

Laura E. Litchard
DEPUTY PROTHONOTARY

Philadelphia, 19107
June 28, 1977

Kenneth Aaron, Esq.,
Casper, Devidson, Rutstein & Aaron
Suite 935 Lafayette Building
Phila., Pa. 19106

In re: City of Philadelphia v. Gordon
MacDonald and Lawrence Rock
Petitioners
No. 2973 Allocatur Docket

Dear Mr. Aaron:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"June 27, 1977
Denied
By the Court".

Very truly yours,
/s/
Sally Mrvos
Prothonotary

SMM:mb
CC: Stewart M. Weintraub, Esq.